

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

<hr/>)	
In the Matter of)	
)	
RingCentral, Inc.)	CG Docket No. 02-278
)	
Petition for Expedited Declaratory Ruling)	
<hr/>)	

REPLY COMMENTS OF RINGCENTRAL, INC.

Bruce Johnson
Vice President, Legal
RingCentral, Inc.
1400 Fashion Island Blvd
San Mateo, CA 94404

Ronald W. Del Sesto, Jr.
Joshua M. Bobeck
Morgan Lewis & Bockius LLP
2020 K Street, NW
Washington, DC 20006

Dated: September 13, 2016

TABLE OF CONTENTS

Page

Contents

Summary	i
I. SUPPLY PRO MISREPRESENTS RINGCENTRAL’S FAX SERVICE.....	4
III. THE COMMISSION HAS BROAD AUTHORITY TO CONSIDER THE RELIEF THE PETITION REQUESTS THROUGH A DECLARATORY RULING	16
IV. RINGCENTRAL’S TERMS OF SERVICE ESTABLISH THE CONDITIONS UNDER WHICH THE SERVICE MUST BE USED BY A RINGCENTRAL CUSTOMER.....	21
V. THE COMMISSION SHOULD CLARIFY THAT THE <i>DE MINIMIS</i> EXCEPTION CAN APPLY WHERE NEITHER AN INFORMATIONAL NOR TRANSACTIONAL MESSAGE IS SENT.....	24
VI. PERMITTING THIRD PARTY CONSENT IN THE CONTEXT OF FAX MESSAGES IS CONSISTENT WITH EXISTING COMMISSION POLICY	26
VII. CONCLUSION.....	30

Summary

RingCentral, Inc. (“RingCentral”) respectfully submits these reply comments supporting its Petition for Expedited Declaratory Ruling (“Petition”). The Petition seeks an expedited declaratory ruling clarifying certain portions of the FCC’s regulations promulgated under the Telephone Consumer Protection Act (“TCPA” or “Act”), namely: (1) that a fax broadcaster whose facilities or services that are used by a third party content generator is not itself the “sender” of a facsimile, for purposes of the TCPA’s prohibition against sending unsolicited advertisements by facsimile; (2) *de minimis* promotional phrases contained in otherwise bona fide informational, transactional or even another party’s unsolicited fax advertising communications do not constitute “unsolicited advertisements” in violation of the TCPA; and (3) in the alternative, in certain limited circumstances fax broadcaster “senders” can rely on third party “consent” for sending *de minimis* information along with a facsimile that is otherwise lawfully sent by the fax broadcaster’s customer to a third party recipient.

First, RingCentral highlights a number of the facts which underlie Supply Pro Sorbent, LLC’s (“Supply Pro”) putative class action complaint. For example, Supply Pro wrongly asserts that customers must use template cover sheets made available to RingCentral’s customers when sending faxes using the company’s service. They also deceptively allege that RingCentral intentionally chose systematically to foist its advertisements on the recipients of its customers’ faxes. Thus, rather than only focusing on the legal issues raised by the Petition, RingCentral must also use its reply comments to clarify these misstatements.

With respect to the salient issues raised by the Petition, the opposing parties raise no viable objections. They seek to obfuscate the requests for clarification made in the Petition, along with the bases for those requests, by focusing on ancillary matters or factual disputes not subject to adjudication by the Commission.

While it appears that the Commission's rules are straightforward with respect to when common carriers and fax broadcasters may be liable for sending faxes, parties filing opposing comments attempt to confuse the clear standards established by the Commission. Some take the unsupportable position that RingCentral is liable as a "sender" under the TCPA by alleging that its conduct meets the "on whose behalf" standard. However, it is the customer and not RingCentral that makes that choice--if the customer elected not to send a fax, or elected to send a fax without an optional cover sheet, then the cover sheet would not be transmitted. Accordingly, the "sole actor responsible" for sending the cover sheet is the customer, not RingCentral.

Some parties likewise advocate for a Commission ruling that a party is a "sender" under the TCPA, regardless of any other circumstances, if such party's goods or services are advertised in an unsolicited fax advertisement. But aside from the fact that the Commission cannot simply reverse its prior interpretation of the term "sender" as set forth in the Commission's *Letter Brief*, the interpretation advocated by these parties would be both incorrect as a matter of law and bad policy.

Opponents of the Petition also make several misleading procedural arguments regarding the Commission's authority to grant the relief sought. These arguments all fail because they do not acknowledge the broad authority and discretion the Commission has when proceeding by declaratory ruling and because they focus on snippets of text in the Petition to misrepresent the arguments actually made.

Attacks on RingCentral's background information regarding its Terms of Service are misplaced both as a matter of fact and a matter of law. Of course, the Petition discusses the Terms of Service to provide the Commission context with respect to the legal arguments

raised—the opposing commenter’s focus on them simply demonstrates their inability to raise reasonable legal arguments against the bases for relief set forth in the Petition.

In the Petition, RingCentral also asked the Commission to clarify the scope of its rulings regarding *de minimis* advertising and create a bright line exemption, not limited to whether the fax at issue was informational or transactional. Opposing parties have, as expected, responded formulaically to this proposal by noting that the *de minimis* exception has been applied by the Commission only to informational or transactional messages. Of course, RingCentral does not claim that the underlying fax in its dispute was either informational or transactional—indeed, RingCentral has no information about the content of that fax, since it didn’t create the fax or select the recipient of the fax. Instead, RingCentral asks the Commission to clarify that in certain circumstances, such as those in RingCentral’s case, when a fax broadcaster includes *de minimis* advertising on a fax transmittal that is then conveyed by a third party, such transmissions should not result in TCPA liability.

Finally, in alternative grounds for relief in the Petition, RingCentral requested clarification that fax broadcasters can rely on consent obtained by their customers to send *de minimis* promotional information along with a facsimile that is otherwise lawfully authored and sent by a the fax broadcaster’s customer to a third party recipient (*Letter Brief*, third party consent). A number of parties opposing the Petition argue that while the FCC has previously found that third party consent is acceptable under the TCPA, that ruling was made under a different section of the TCPA applicable to phone calls and text messages and thus the FCC should not grant RingCentral’s requested relief. RingCentral respectfully asserts that third party consent should be recognized in the context of fax messaging just as it is in the case of calls and

texts, and that doing so will ensure that the Commission is consistent in its policies for all types of messaging covered by the TCPA.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)

RingCentral, Inc.)

Petition for Expedited Declaratory Ruling)

CG Docket No. 02-278

REPLY COMMENTS OF RINGCENTRAL, INC.

RingCentral, Inc. (“RingCentral”), by its undersigned counsel, respectfully submits these reply comments supporting its Petition for Expedited Declaratory Ruling¹ pursuant to the Public Notice issued July 29, 2016, by the Federal Communication Commission (“Commission” or “FCC”) in the above-referenced proceeding.² Prior to responding to the objections raised by a few habitual Telephone Consumer Protection Act (“TCPA”) plaintiffs in their comments on the RingCentral Petition, the company would like to highlight the facts that underlie Supply Pro Sorbent, LLC’s (“Supply Pro” or “plaintiff”) putative class action complaint.³

RingCentral offers a myriad of cloud-based communications services including fax services.⁴ A RingCentral customer, *not RingCentral*, sent plaintiff a four-page fax. RingCentral’s

¹ *RingCentral, Inc.’s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (filed July 6, 2016) (“RingCentral Petition”).

² *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by RingCentral, Inc.*, DA 16-863 (rel. July 29, 2016).

³ *See Class Action Complaint for Damages, Supply Pro Sorbents, LLC v. RingCentral Inc.*, Case No. 16-cv-2113 (N.D. Cal. Filed Apr. 21, 2016).

⁴ *See* RingCentral Petition, at 2-7 for additional details concerning’s RingCentral’s service offerings.

customer chose the fax recipient, obtained the relevant phone number associated with the fax, and created the text that comprises the four-page fax. RingCentral did provide any advice about sending the fax communication, did not supply the fax number, and did not supply the content of the four-page fax. Instead, the *customer* elected to use a template cover sheet made available by RingCentral to all of its customers for their convenience. The template cover sheet included in its footer the tag line “Send and receive faxes with RingCentral[,]” RingCentral’s website address and RingCentral’s logo.⁵ The footer appeared only on the cover sheet of the four-page fax. RingCentral made the cover sheet available for use by its customers at their option and in their exclusive discretion. Customers can use their own cover sheet (without the footer) or no cover sheet at all, if they prefer. RingCentral had nothing to do with the sending of the fax that is the basis of plaintiff’s putative class action. None of these facts are contested by the plaintiff.

It is on this basis that Supply Pro filed a putative class action complaint seeking damages including, but not limited to, \$500 in statutory damages for each template cover sheet described above sent by RingCentral’s customers, treble damages if it is determined that RingCentral’s conduct was knowing or willful on a per fax cover sheet basis, injunctive relief, costs and other relief.⁶ Remarkably, the plaintiff *does not allege* that RingCentral authored the faxes beyond the footer identified above, that RingCentral identified fax recipients, that RingCentral provided telephone numbers associated with recipients’ fax devices, or that RingCentral provided any legal advice regarding TCPA compliance. Instead, the putative class action lawsuit rests solely on the fact that RingCentral made template cover sheets available to customers containing the

⁵ See RingCentral Petition, at 11 to review a lightly redacted cover sheet as received by the plaintiff.

⁶ See Class Action Complaint for Damages, *Supply Pro Sorbents, LLC v. RingCentral Inc.*, Case No. 16-cv-2113 (N.D. Cal. Filed Apr. 21, 2016), at 13-14.

footer described above and that RingCentral's customers sometimes used those templates when sending their own faxes.

Apart from the fact that there is no basis in the TCPA for the plaintiff to seek such relief, it defies common sense that RingCentral could even face allegations of such damages for making available to customers a template cover sheet for their convenience that they may choose to use when sending a fax. Unfortunately, receiving a facsimile (or call/text message on a cellphone) has become a lottery ticket where untold riches await would-be plaintiffs and plaintiffs' attorneys if only they can come up with a tortured interpretation of a dated, confusing statute transforming innocuous conduct into a major legal headache for the targets of these nuisance class action lawsuits. To be sure, the TCPA can and does serve a useful purpose. But the facts outlined above provide no reasonable basis for relief and would not even be a federal case but-for the promise of windfall riches that accrue mainly to plaintiffs' attorneys.

Should the Commission doubt that there is a crisis related to abuse of the TCPA by plaintiffs' attorneys, RingCentral notes that in 2015 there were a total of 3,710 TCPA-related cases filed, representing a 45% increase over the prior year.⁷ Lest the Commission believe that this is an anomaly, TCPA lawsuits filed through the end of July, 2016, total 2,809, a 43.3% increase over the same time period in 2015.⁸ It is imperative that the Commission act on the RingCentral Petition in an effort to stem the tide of baseless TCPA-related litigation that harms consumers' interests. Continued misinterpretation of the TCPA threatens innovation and risks limiting the availability of legitimate and helpful services that inure to consumers' benefit.

⁷ See <http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review> (last visited Sept. 13, 2016); see also RingCentral Petition, at 8-9.

⁸ See <https://webrecon.com/slip-slidin-away-fdcpa-trending-down-5-months-in-a-row-debt-collection-litigation-cfpb-complaint-stats-july-2016/> (last visited Sept. 13, 2016).

I. SUPPLY PRO MISREPRESENTS RINGCENTRAL’S FAX SERVICE

Supply Pro wrongly asserts that customers must use template cover sheets made available to RingCentral’s customers when sending faxes using the company’s service.⁹ Supply Pro falsely alleges that “[a]s part of [its fax service], RingCentral provides cover page forms that automatically include a footer advertising RingCentral’s service to the recipient.”¹⁰ Later in its comments, Supply Pro deceptively alleges that “RingCentral intentionally chose systematically to foist its advertisements on the recipients of its customers’ faxes”¹¹ Despite clear evidence to the contrary in the RingCentral Petition, Supply Pro misleadingly cites to out-of-context portions of the RingCentral Petition and claims that RingCentral’s customers *must* use template cover sheets provided by RingCentral.¹² That is simply not true. Regardless of whether customers use the website, softphone, e-mail, desktop application or other methods to send faxes, RingCentral’s customers can elect to send faxes with no cover sheets.¹³

II. RINGCENTRAL IS NOT THE “SENDER” UNDER THE TCPA

The Commission’s rules and interpretation of the term “sender” under the TCPA are clear. The “sender” of a prohibited fax is “the person or entity *on whose behalf* a facsimile unsolicited advertisement is sent or whose goods or services are advertised in the unsolicited advertisement.”¹⁴ Common carriers and fax broadcasters are not liable under the TCPA for the

⁹ Supply Pro Sorbents, LLC Comments, CG Docket No. 02-278, at 2 (filed Aug. 29, 2016).

¹⁰ *Id.*

¹¹ *Id.*, at 17.

¹² *Id.* at 2, 4.

¹³ RingCentral Petition, at 4.

¹⁴ 47 C.F.R. § 64.1200(f)(10) (emphasis supplied); *see also*, RingCentral Petition, at 12-13.

transmission of a prohibited fax message.¹⁵ The Commission determined that such parties are not liable for transmitting unsolicited faxes based on Congress' intent to attach liability only to those parties that are either initiating the telephone call or sending the fax message and the TCPA prohibitions do not apply to entities that are "not the originator or controller of the content of the call or message."¹⁶ The Commission noted that only where fax broadcasters or common carriers have a "high degree of involvement in, or actual notice of, the unlawful activity and fail[] to prevent such facsimile advertisements[,] will such parties expose themselves to liability."¹⁷ To the extent that there was any confusion as to whether a party whose goods or services appeared in an unsolicited fax where that party had nothing to do with sending or initiating of the fax, the Commission made clear that such an interpretation of its rules was incorrect.¹⁸

While it appears that the Commission's rules are straightforward with respect to when common carriers and fax broadcasters may be liable for sending faxes, parties filing opposing comments attempt to confuse the clear standards established by the Commission. For example, Mr. Roylance wrongly asserts that "There is no doubt that RingCentral actually 'sent' the faxes

¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407-08 (1995) ("1995 TCPA Order"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8780 (1992) ("1992 TCPA Order"); RingCentral Petition at 13, 13 n.17.

¹⁶ 1995 TCPA Order at 12407 n.90 (1995) (citing to Senate Rep. No. 178, 102d Cong., 1st Sess. 9 (1991)); see also, RingCentral Petition, at 13.

¹⁷ 2006 TCPA Order at 3808; RingCentral Petition, at 15.

¹⁸ See *Letter from Laurence N. Bourne et al.*, Counsel for FCC, to John Ley, 11th Cir. Clerk of Court, 2014 WL 3734105 at * 4 (July 17, 2014) (*Palm Beach Golf Center-Boca, Inc. v. Sarris*, Appeal No. 13-14013) (explaining that the codification of the rules in the 2006 TCPA Order "is consistent with the Commission's pre-existing uncodified interpretation that the 'entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.'" (citations omitted) ("Letter Brief"); see also, RingCentral Petition, at 19-25.

in question; the actual sending is done by RingCentral's hardware."¹⁹ Of course, Mr. Roylance is clearly wrong as to which party constitutes a "sender" under the TCPA and the rules promulgated by the Commission, since common carriers and fax broadcasters are not "senders" pursuant to the TCPA when such parties simply transmit facsimiles.²⁰ But Mr. Roylance later contradicts his earlier position by asserting that RingCentral would have no liability if a customer sends an unsolicited fax advertisement but did not elect to use an optional cover sheet provided by RingCentral, despite the fact that RingCentral's service and "hardware" is used in both instances.²¹

Supply Pro also takes an unsupportable position that RingCentral is liable as a "sender" under the TCPA by alleging that its conduct meets the "on whose behalf" standard since "RingCentral not only had a high degree of involvement in creating and including its ad [referring to the footer that appears only on the cover page] in all of the faxes at issue in its Petition, but was the sole actor responsible for doing so."²² Alleging that RingCentral had a "high degree of involvement in creating" the template cover page is nothing more than a tautology. It proves nothing and does not explain why such conduct leads to liability under the TCPA. It is like arguing that the company that makes a hammer is responsible when someone uses the hammer to break a window, because the manufacturer had a high degree of involvement in creating the hammer!

Asserting that RingCentral had a "high degree of involvement" in *selecting* the cover sheet for the fax received by Supply Pro or any other recipient, and "was the sole actor

¹⁹ Gerald Roylance Comments, CG Docket No. 02-278, at 2 (filed Aug. 29, 2016).

²⁰ See 1995 TCPA Order, 10 FCC Rcd at 12407-08; 1992 TCPA Order, 7 FCC Rcd at 8780.

²¹ See Roylance, at 4.

²² Supply Pro, at 13.

responsible for doing so[.]” is false. As explained above and in the RingCentral Petition,²³ customers may elect not to use a cover sheet or use their own. It is the customer, not RingCentral, who makes that choice. If the RingCentral customer elected not to send a fax, or elected to send a fax without an optional cover sheet, then the cover sheet would not be transmitted. Accordingly, the “sole actor responsible” for sending the cover sheet is the customer and not RingCentral.

Supply Pro also argues that merely by creating a selection of cover sheets for optional use by its customers, RingCentral meets the Commission’s “on whose behalf” standard because “RingCentral originated and controlled [the content of the footer.]”²⁴ But this argument simply repeats the same argument above. The fact that RingCentral made cover sheets available for customers does not result in TCPA liability. And Supply Pro repeats its false allegation that RingCentral “controlled” the cover sheet. Again, RingCentral does not control the use of cover sheets; its customers do. There is no definition of the word “control” that could even be stretched to allow Supply Pro to argue that RingCentral controls the act of sending cover sheets when all the company did was make such cover sheets available for use. If instead by “control” Supply Pro means that RingCentral made the cover sheet available for use by its customers, this is simply redundant with Supply Pro’s use of the word “originated” and proves nothing with respect to TCPA liability.

Supply Pro’s next argument is exactly the reason why the Commission must clarify what “sender” means under the TCPA and act expeditiously on RingCentral’s Petition. Supply Pro advocates for a Commission ruling consistent with *Siding & Insulation Co. v. Alco Vending*,

²³ See *supra* Section I; RingCentral Petition, at 4.

²⁴ Supply Pro, at 14.

*Inc.*²⁵ Specifically, Supply Pro asserts that the Commission should “uphold its *Sender Regulation* and confirm that courts such as *Siding* have correctly applied it.”²⁶ As misinterpreted by Supply Pro, a party is a “sender” under the TCPA any time such party’s goods or services are advertised in an unsolicited fax advertisement, regardless of any other circumstances.²⁷ Anderson + Wanca takes this argument one step further and argues that the Commission already interprets “sender” to mean a party whose goods or services are advertised in a fax without regard to their level of involvement.²⁸

As explained in greater detail in the Petition, the Sixth Circuit in *Siding* has introduced considerable confusion about the interpretation of the term “sender” under the TCPA.²⁹ The Sixth Circuit wrongly concluded that the Commission changed its interpretation of the term “sender” where “liability after promulgation of the 2006 definition would extend to both those entities ‘on whose behalf the advertisement [was] sent *and* those whose goods or services [were] advertised or promoted in the unsolicited advertisement.’”³⁰ The Sixth Circuit rejected the Commission’s *Letter Brief* where the Commission explained that it had intended for the 2006 codification of the term “sender” to be consistent with its pre-existing uncoded interpretation

²⁵ 822 F.3d 866 (6th Cir. 2016).

²⁶ Supply Pro, at 15. The reference to “*Sender Regulation*” by Supply Pro is to 47 C.F.R. § 64.1200(f)(10). See Supply Pro, at 8. 47 C.F.R. § 64.1200(f)(10) defines the term “sender” as “the person or entity on whose behalf a facsimile unsolicited advertisement is sent *or whose goods or services are advertised or promoted in the unsolicited advertisement.*” (Emphasis supplied.) Supply Pro’s argument is that the FCC should treat the definition as disjunctive such that the italicized portion of the definition establishes a separate basis for finding a party a “sender” under the TCPA and therefore liable. Of course, the FCC has already explicitly rejected this position in the FCC’s *Letter Brief*. See *Letter Brief*, at * 3; RingCentral Petition, at 19-25.

²⁷ See Supply Pro, at 15.

²⁸ Anderson + Wanca Comments, CG Docket 02-278, at 3-4.

²⁹ See RingCentral Petition, 19-25.

³⁰ *Siding*, at 822 F.3d at 894 (6th Cir. 2016) (emphasis in original).

of the term.³¹ Instead, the Sixth Circuit rejected the reasoning in the *Letter Brief* to be “not consistent with [the FCC’s] own regulations.”³² Now, Supply Pro asks that the Commission reverse its position in the *Letter Brief* and find that the term “sender” should be interpreted so as to ignore the “on whose behalf” standard and open the door for wide-ranging TCPA liability simply on the basis that a party’s goods or services were advertised in an unsolicited fax advertisement.³³ Aside from the fact that the Commission cannot simply reverse its interpretation of the term “sender” as set forth in the *Letter Brief* through a declaratory ruling, to adopt the interpretation advocated by Supply Pro would be incorrect as a matter of law and bad policy.³⁴

As explained in greater detail in the RingCentral Petition, the Commission cannot reverse its position in the *Letter Brief* even on a prospective basis for at least two reasons.³⁵ First, the text of the statute does not allow for interpreting the term “sender” in the manner advocated by Supply Pro.³⁶ And second, even if such an interpretation of “sender” would be consistent with the statutory text, which it would not, the Commission would have to adopt such an interpretation pursuant to a notice and comment rulemaking as required by the Administrative

³¹ See *Letter Brief*, at * 3.

³² *Siding*, at 822 F.3d at 895.

³³ Supply Pro, at 15.

³⁴ See *CIN-Q Automobiles, Inc. et al v. Buccaneers Limited Partnership*, 2014 WL 7224943 at *6 (M.D. Fla. 2014) (discussing the absurd results that would follow such as “sabotage liability”); RingCentral Petition, at 20-21.

³⁵ RingCentral Petition, at 19-25.

³⁶ RingCentral Petition, at 22. See, e.g., *Bridgeview Health Care Center v. Clark*, 2015 WL 1598115, at *7 (N.D. Ill Apr. 8, 2015) (“Congress sought to penalize persons who advertise their goods via junk faxes. But the very notion of advertising one’s goods entails that one must do something to advertise them. A rule of strict liability, however, would go much further and penalize people for simply having goods that are ‘advertised’ in a fax (perhaps unwillingly, by third parties), rather than penalize only those who take steps to advertise their goods unfairly by shifting the cost of advertising to the recipient.”) (emphasis in original).

Procedure Act.³⁷ Moreover, it is hard to imagine what beneficial policy such an interpretation of “sender” would serve where parties that had nothing to do with an unsolicited fax advertisement would be subject to \$500 in damages for each fax sent merely due to the fact that their goods or services were mentioned, however tangentially, in such faxes. Further, such an interpretation would allow parties to fall victim to “sabotage liability.”³⁸

As detailed in the RingCentral Petition,³⁹ one court has explained that interpreting the term “sender” as imposing strict liability on parties who are referenced in unsolicited advertisement faxes “leads to absurd results which cannot possibly follow from a permissible construction of the TCPA or from an agency’s reasonable interpretation of its regulations.”⁴⁰ The court continued,

To conclude that an individual or entity is per se a ‘sender’ under the TCPA merely because their ‘goods or services’ appear as advertised in the faxes at issue . . . would give rise to, what the parties have labeled, sabotage liability. By way of illustration, it would allow a rabid Tampa Bay Buccaneers fan—with a rhino helmet, red face paint, and an undying devotion to the organization—to trigger *per se* liability for the organization under the TCPA by gratuitously, and without directive from or notice to the organization, promoting season ticket sales via fax. The same could be true of a random individual in Boston, mind brewing with *scienter*, who works to implicate the New York Yankees by advertising their season tickets.⁴¹

³⁷ RingCentral Petition, at 22-23. *See, e.g., Joint Petition Filed by Dish Network, LLC, et al. for a Declaratory Ruling Concerning the Telephone Consumer Protection Act*, 28 FCC Rcd 6574, 6586 (2013). But even had the FCC conducted a notice and comment proceeding on such an interpretation of the term “sender,” which it did not, such an interpretation would fail as a matter of law as it would violate the terms of the statutory text.

³⁸ *See* RingCentral Petition, at 20-21.

³⁹ RingCentral Petition, at 20-21.

⁴⁰ *See CIN-Q Automobiles, Inc. et al v. Buccaneers Limited Partnership*, 2014 WL 7224943 at *6 (M.D. Fla. 2014). Note that this case was decided prior to *Siding & Insulation Co. v. Alco Vending, Inc.*

⁴¹ *Id.*, 2014 WL 7224943 at *6.

Supply Pro does not present a coherent argument as to why TCPA liability would not subject parties to “sabotage liability.” Instead, Supply Pro simply claims that “RingCentral was not the victim of any such conduct.”⁴²

Supply Pro asserts that should the Commission adopt a definition of “sender” such that a party could face liability for unsolicited fax advertisements where a party’s only connection to the fax is that its goods or services appear in such material, such a definition “can be reasonably construed to cover only actual entities advertising their own goods and services of their own volition without being extended to the absurd and extremely unlikely saboteur scenario.”⁴³ But it is not necessary to imagine a malicious saboteur to understand the absurd results of the interpretation supported by Supply Pro. Suppose that the hammer manufacturer mentioned earlier has developed a new model of ball-peen hammer, and sends out a fax to a past customer (with the customer’s consent) mentioning the names of specific hardware stores where the new hammer is on sale. Under the extreme interpretation urged by Supply Pro, each of those hardware stores would become a “sender” of the fax and would each incur TCPA liability, because the recipient only consented to receive faxes from the hammer manufacturer, not from the stores.

The obvious response is that the Commission has already limited the definition of “sender” in the manner proposed by Supply Pro, *i.e.*, the “on whose behalf” standard set out in the definition of “sender.”⁴⁴ Moreover, Supply Pro is advocating conflicting positions with respect to the definition of “sender” – on the one hand liability should extend to any party so long as their goods or services appear in an unsolicited fax advertisement, on the other the

⁴² Supply Pro, at 16.

⁴³ Supply Pro, at 16.

⁴⁴ See 47 C.F.R. § 64.1200(f)(10).

definition should be construed so as to avoid the absurd results that would follow from such a definition.⁴⁵ Further confusion follows where Supply Pro suggests that some standard exists between these two conflicting poles and that it would be beneficial in assessing liability where “[a] fax ad could be sent on behalf of someone whose goods or services were not advertised such as a ‘highly involved’ broadcaster or an agent for the advertiser as in *Palm Beach*.”⁴⁶ The “on whose behalf” standard already addresses this conduct. A “highly involved” broadcaster or an agent for the advertiser can be found liable under the TCPA using the existing definition of “sender” and applying the factors the Commission has determined relevant when examining the conduct of such a party.⁴⁷ Moreover, Supply Pro’s general reference to *Palm Beach* is perplexing as the *Palm Beach* court applied the Commission’s “on whose behalf” standard.⁴⁸ And, in reversing the district court’s summary judgment in favor of the defendant, the *Palm Beach* court found that there was enough evidence to allow the suit to proceed against the party whose services were advertised in the alleged unsolicited fax advertisement.⁴⁹ Thus, there is nothing in the *Palm Beach* decision that lends support to Supply Pro for a test that differs from the Commission’s existing “on whose behalf” standard.

⁴⁵ Supply Pro, at 16.

⁴⁶ Pro Supply, at 16-17. Presumably, Supply Pro is referencing the appellate case reversing the district court’s order. See Supply Pro, at 6; see also, *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 981 F. Supp. 2d 1239 (S.D. Fla. 2013) rev’d and remanded by *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., PA*, 11th Cir. (Fla.), (Mar. 9, 2015).

⁴⁷ In fact, the FCC has used similar terminology in describing when a common carrier or fax broadcaster may be found liable under the TCPA. See *1992 TCPA Order*, 7 FCC Rcd 8780 (“In the absence of a ‘**high degree of involvement**’ or actual notice of illegal use and failure to take steps to prevent such transmissions,’ common carriers will not be held liable for the transmission of a prohibited facsimile message.”) (emphasis supplied).

⁴⁸ See *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., PA*, 781 F.3d 1245, 1254-5 (11th Cir. 2015).

⁴⁹ See *id.* at 1257-8.

Undeterred by its nonsensical position, Supply Pro extols as a virtue the adoption of some undefined standard that would subject an advertiser to TCPA liability that “approves the ad and intends it to be sent, but the broadcaster sends it to the wrong targets.”⁵⁰ Why an advertiser should be liable under the TCPA when a broadcaster sends faxes to telephone numbers not supplied by the advertiser nor authorized by the advertiser is left unaddressed by Supply Pro. In fact, at least one court has found that an advertiser was not liable under such facts⁵¹ and it is unclear what the policy justification would be for extending liability to this circumstance. The only logical conclusion that can be drawn from Supply Pro’s arguments with respect to how the Commission should interpret “sender” is that Supply Pro is advocating not for a new standard between “on whose behalf” and one that would expose defendants to “sabotage liability,” but for a standard that would encompass “sabotage liability” as set out by the Sixth Circuit in *Siding*.

Further evidence that the Commission’s definition of the term “sender” requires clarification is found in the comments of Anderson + Wanca. Anderson + Wanca misinterprets the Commission’s *Letter Brief* as providing support for an interpretation of the TCPA where parties would face liability based merely on their goods or services appearing in an unsolicited fax advertisement regardless of whether they meet the “on whose behalf” standard. By selectively quoting from the Commission’s *Letter Brief*, Anderson + Wanca erroneously posits that the *Letter Brief* adopted an interpretation of “sender” such that liability attaches to parties *solely* based on their inclusion in an unsolicited fax advertisement, no matter what the

⁵⁰ Supply Pro, at 17.

⁵¹ See *Bridgeview Health Care Center, LTD v. Clark, d/b/a Affordable Digital Hearing*, 816 F.3d 935 (7th Cir. 2016). Note that the Sixth Circuit in *Siding* considered the 7th Circuit’s finding in *Bridgeview* and rejected it based on its reliance of agency theories and instead adopted the position that the definition of “sender” extends to those who goods or services appear in an unsolicited fax advertisement even if they had nothing to do with the fax or its transmission. See *Siding*, 822 F.3d at 897.

circumstances: “The Commission emphasized that ‘so long as the transmitted fax constitutes an unsolicited fax advertisement promoting the defendant’s goods or services’ the regulation means what it says and the person ‘*whose goods or services are advertised or promoted in the unsolicited advertisement*’ is directly liable.”⁵² This argument, even more clearly than Supply Pro’s, would hold hardware stores liable simply for being mentioned by a manufacturer as a place that sells their hammers.

But review of the Commission’s *Letter Brief* makes clear that Anderson + Wanca only quoted the second prong of the definition of “sender.”⁵³ Moreover, the context of the Commission’s analysis makes clear that the Commission was addressing the potential liability of a party that had had not actually transmitted the fax but may have engaged a party to do so on its behalf.⁵⁴ The Commission was making clear that the party “on whose behalf” an unsolicited fax advertisement was sent could be found liable even if that party did not transmit the fax *and* only if the “transmitted fax constitutes an unsolicited fax advertisement promoting the defendant’s goods and services.”⁵⁵ In other words, the Commission was making clear that a fax can be sent “on behalf” of a party that did not transmit the fax, but only if the fax advertises such party’s goods or services. Accordingly, the Commission was not establishing a separate basis of liability for a party whose goods or services appeared in an unsolicited fax advertisement but otherwise

⁵² Anderson + Wanca, at 4 (citing *Letter Brief* at * 5).

⁵³ See *Letter Brief*, at *5 (“By its plain terms, 47 C.F.R. § 64.1200(f)(10) defines the direct liability-incurring ‘sender’ not as the party that physically transmits the fax, but as ‘the person or entity *on whose behalf* a facsimile unsolicited advertisement is sent *or whose goods or services are advertised or promoted in the unsolicited advertisement.*’) (emphasis in original).

⁵⁴ See *id.* (“Read in light of that binding regulatory definition, the unsolicited fax prohibition in section 227(b)(1)(C) clearly ‘allow[s] a plaintiff to recover damages [under a theory of direct liability] from a defendant who [transmitted] no facsimile to the plaintiff, but whose independent contractor did,’ July 7 Letter at 1, so long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant’s goods or services.”) (citations omitted).

⁵⁵ *Id.*

had no connection whatsoever to the unsolicited fax advertisement; instead, the Commission clarified how to apply its “on whose behalf standard.”⁵⁶ Anderson + Wanca’s mistaken interpretation of the *Letter Brief* is further illustrated by the fact that the FCC makes clear in the *Letter Brief* that the “on whose behalf” standard is the core to determining which party is liable as a “sender” under the TCPA.⁵⁷

Anderson + Wanca also wrongly asserts that there is a dichotomy between the meaning of the term “sender” pre- and post-August 1, 2006, *i.e.*, before and after the Commission’s 2006 TCPA Order.⁵⁸ Citing to *Imhoff Inv., LLC v. Alfoccino, Inc.*,⁵⁹ Anderson + Wanca incorrectly concludes that the Commission expanded the definition of “sender” as applying to parties that had nothing to do with the creation or sending of an unsolicited fax advertisement but whose goods or services appeared in such a communication.⁶⁰ But Anderson + Wanca’s reliance on *Imhoff* is misplaced. Even a cursory review of the facts of the case makes clear that the defendant in *Imhoff* satisfied the Commission’s “on whose behalf” standard.⁶¹ Moreover, the *Letter Brief* directly rejects Anderson + Wanca’s erroneous assertion that there are two separate definitions of the term “sender” delineated by the 2006 TCPA Order. The Commission makes clear in the

⁵⁶ See *Letter Brief*, at * 3.

⁵⁷ See *id.* (“The FCC adopted the codified definition of ‘sender’ in 2006.”). The FCC then quotes from the 2006 TCPA Order, “We take this opportunity to emphasize that under the Commission’s interpretation of the facsimile advertising rules, *the sender is the person or entity on whose behalf the advertisement is sent.*”) *Letter Brief*, at * 3 (emphasis supplied) (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 FCC Red 3787, 3822 (2006) (“2006 TCPA Order”).

⁵⁸ 2006 TCPA Order, 21 FCC Rcd at 3808.

⁵⁹ 792 F.3d 627 (2015).

⁶⁰ Anderson + Wanca, at 4.

⁶¹ *Imhoff*, 792 F.3d at 629-630 (detailing that, among other activities, the defendant had hired a fax broadcaster, the fax broadcaster had transmitted defendant’s advertisements, defendant directed the fax broadcaster to send 20,000 faxes, and there was no evidence that defendant had sought legal advice from the fax broadcaster concerning the legality of sending the faxes).

Letter Brief that when it codified the definition of “sender” in the 2006 TCPA Order, “That codification is consistent with the Commission’s pre-existing uncoded interpretation that ‘the entity or entities on whose behalf [faxes] are transmitted are ultimately liable for compliance with the rule banning unsolicited [fax] advertisements.’”⁶² Anderson + Wanca also cites to a number of cases alleging that courts look only to whether a party’s goods or services appear in an unsolicited fax advertisement if the fax was sent after August 1, 2006.⁶³ Assuming *arguendo* that such cases do support Anderson + Wanca’s position, this is simply further evidence of the need for the Commission to clarify the appropriate interpretation of its *Letter Brief*.

III. THE COMMISSION HAS BROAD AUTHORITY TO CONSIDER THE RELIEF THE PETITION REQUESTS THROUGH A DECLARATORY RULING

Opponents of the Petition make several misleading procedural arguments attacking the Commission’s authority to grant the relief sought. These procedural arguments include claims that RingCentral is collaterally attacking the Commission’s rules and TCPA orders,⁶⁴ claims that the Petition argues that “Rule 64.1200(f)... is invalid;”⁶⁵ claims that there is no controversy or uncertainty for the Commission to address;⁶⁶ and claims that the Petition is an untimely petition for reconsideration of the “Sender” rule.⁶⁷ These arguments all fail because they do not acknowledge the broad authority and discretion the Commission has when proceeding by declaratory ruling and because they focus on snippets of text in the Petition to misrepresent the arguments actually made.

⁶² *Letter Brief*, at * 3 (citing 1995 TCPA Order, 10 FCC Rcd 12407).

⁶³ Anderson + Wanca, at 5.

⁶⁴ Anderson + Wanca, at 2.

⁶⁵ Anderson + Wanca, at 1-2.

⁶⁶ Supply Pro, at 9.

⁶⁷ Supply Pro, at 10-11.

First, Supply Pro claims that the Commission cannot act on the Petition under Section 1.2 of its rules because some courts have applied the TCPA and the Commission’s rules to different facts without any difficulty, and have not identified any ambiguity.⁶⁸ But this does not address the Commission’s broad power to act by declaratory ruling. There does not need to be any “ambiguity,” just a controversy or uncertainty. Both are equally applicable here.

In interpreting and administering its statutory obligations, the Commission “has very broad discretion to decide whether to proceed by adjudication or rulemaking.”⁶⁹ As the Supreme Court has explained, “Section 1.2 grants the FCC the power to issue declaratory orders and is derivative of § 554(e) of the APA.”⁷⁰ Section 554(e) provides that an “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”⁷¹

The FCC may issue declaratory rulings to “resolve disputes among specific individuals in specific cases” such as the specific dispute raised by Supply Pro against RingCentral.⁷² Courts have upheld the FCC’s use of declaratory rulings that “involved concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific

⁶⁸ Supply Pro, at 8-10.

⁶⁹ *Conference Group v. FCC*, 720 F.3d, 957, 965 (2013) citing *Qwest Services Corp. v. FCC*, 509 F.3d 531, 536 (D.C.Cir. 2007); *see also*, *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001).

⁷⁰ *City of Arlington, Texas v. FCC*, 668 F.3d 229, 240 (5th Cir. 2012) *rev’d on other grounds*, 133 S. Ct. 1863 (2013).

⁷¹ *Id.*, citing 5 U.S.C. § 554(e).

⁷² *See City of Arlington*, 668 F.3d at 242 citing *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

factual scenarios.”⁷³ Similarly, adjudications resolved by declaratory ruling are often “highly fact-specific” and resolved “case-by-case.”⁷⁴

This appears to be precisely the situation here. Supply Pro and RingCentral are engaged in a dispute where Supply Pro believes RingCentral violated the TCPA; RingCentral disputes the validity of Supply Pro’s claims and has asked the Commission to clarify that its rules should not be construed to make RingCentral – a fax broadcaster – liable for a fax sent by another party when the only possible advertising message related to RingCentral was a single line of text on the cover page of a four-page fax. Plainly RingCentral is asking the Commission to terminate this controversy. Further, RingCentral has asked the Commission to resolve uncertainty regarding the application of the “sender rule.” In particular, as discussed above, at least one court has rejected the interpretation of that rule set forth by the Commission in a brief to a sister Circuit.

Anderson + Wanca further misrepresent the relief the Petition seeks, claiming instead that the rules defining “sender” and “advertisement” are unambiguous.⁷⁵ Anderson + Wanca’s comments then cite to several cases that have no bearing on the discrete questions — the controversies — raised in the Petition.⁷⁶ RingCentral’s Petition identifies numerous issues of ambiguity raised by the unique facts set forth in its Petition: a customer of RingCentral sent a fax (perhaps even one that was unsolicited) to a recipient; RingCentral played no role in determining the content of that message; had no information about the recipient of that message; and merely acted as the conduit by which the RingCentral customer transmitted the fax. To the extent any

⁷³ *City of Arlington*, 668 F.3d at 242.

⁷⁴ *AT&T v. FCC*, 454 F.3d 329, 333 (D.C. Cir. 2006).

⁷⁵ Anderson + Wanca, at 3.

⁷⁶ Anderson + Wanca, at 4-5.

burden was created on the recipient, RingCentral played no role, as it was the RingCentral customer that determined who should receive the fax, created almost all of the content, and chose to include a cover sheet that included text comprising less than a single line in the footer on a cover page of a four-page fax. Despite the wishes of Anderson + Wanca, neither the TCPA nor the FCC's rules are "unambiguous" that in such case RingCentral is the sender of the fax and should be liable.

And liability here serves no purpose. As Supply Pro acknowledges, "the core reason" for the TCPA's restrictions on fax advertising is to prevent advertisers from shifting "the costs of advertising from the Sender to the recipient".⁷⁷ It is not clear what costs Supply Pro claims RingCentral shifted to them. Supply Pro received a four-page fax from a RingCentral customer. RingCentral played no role in determining that Supply Pro should receive the fax; played no role in creating or overseeing the content of that four-page fax. The only role RingCentral played was in designing an optional fax cover sheet that its customer chose to use, containing the company's tagline at the bottom.

It is not clear from the facts of this case that RingCentral's presence on the fax had any impact on the burden the fax caused Supply Pro. Without the tagline, Supply Pro still would have received the fax, which still would have been four pages long. Under the Commission's well-established fax broadcaster exemption, RingCentral would not be liable.⁷⁸ But Supply Pro would have the Commission read its rules as so broadly that it would impose liability on RingCentral for a single inconsequential line on the fax cover page. The Commission has broad authority to resolve controversies such as this one through a declaratory ruling.

⁷⁷ Supply Pro, at 1-2 (citing H.R. Rep. No. 102-317 p. 10 1991).

⁷⁸ EasyLink Services International Corporation Comments, CG Docket No. 02-278, at 4-5.

Further, since agency interpretations of their own rules are typically afforded significant deference by the courts,⁷⁹ there is now, subsequent to the Commission’s *Letter Brief* and the Sixth Circuit decision in *Siding*, substantial uncertainty regarding the application of the “sender rule.” Nor is the Petition an untimely—by ten years—“improper collateral” bid for reconsideration of the Commission’s 2006 TCPA Order.⁸⁰ Supply Pro bizarrely claims that RingCentral argues that if the Sixth Circuit interpretation prevails the Commission’s “sender rule” would not be consistent with the text of the TCPA.⁸¹ No such argument was made. The Petition merely claims that the Commission’s *Letter Brief* is the more sensible reading of the “sender rule” because of the language in the TCPA. Should the Commission revise its position from that set forth in the *Letter Brief*, any subsequent ruling would be subject to judicial review and would stand or fall on its merits.

Nowhere does the Petition ask the Commission to reject its current rules. Anderson + Wanca and Supply Pro have simply lifted snippets from the argument wholly out of context in order to create confusion about the actual aims of the Petition.⁸² As discussed above, Supply

⁷⁹ *Siding*, 822 F.3d at 894 (citing *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000)).

⁸⁰ Supply Pro, at 10-11; Anderson + Wanca, at 2.

⁸¹ Supply Pro, at 11.

⁸² For example the Petition urged the FCC to clarify its definition of “sender” in light of the Sixth Circuit’s overruling of the FCC’s 2014 *Letter Brief* to the 11th Circuit arguing that the codification of the definition of “sender” in the code of federal regulations was consistent with the FCC’s prior uncodified interpretation of that term in the TCPA. At no point did the Petition advance an argument that the current rules are inconsistent with the statute or improperly adopted. The Petition’s aim is limited to resolving the uncertainty raised by the Sixth Circuit’s rejection of the analysis in the FCC’s 2014 *Letter Brief* and terminating the controversy associated with Supply Pro’s TCPA claims against RingCentral. Those are plainly within the FCC’s authority to consider as a declaratory ruling at this time. *See City of Arlington*, 668 F.3d at 243 (“It is true that an agency need not be presented with a specific dispute between two parties in order to use § 554(e)’s declaratory ruling mechanism, because § 554 does not limit an agency’s

Pro's claim against RingCentral raises new and unanticipated issues regarding the application of the Commission's existing rules. Nowhere does the Petition urge the Commission to reverse any rule or decision made under the TCPA. But the facts of this current case are not squarely addressed in the Commission's rules despite the protestations of the Plaintiffs and their advocates. Consistent with its broad authority under the APA and its own rules, the Commission has the authority to act on the petition to terminate such controversies.

IV. RINGCENTRAL'S TERMS OF SERVICE ESTABLISH THE CONDITIONS UNDER WHICH THE SERVICE MUST BE USED BY A RINGCENTRAL CUSTOMER

RingCentral's Terms of Service contain robust requirements that the customer (the author of the fax) comply with the TCPA. They require each customer to represent that it has permission to send the fax to the recipient, and prohibit sending unsolicited advertising through its internet fax service. They also provide that the RingCentral customer is the creator of the content, and solely responsible for determining the destinations and recipients of all outbound communications.⁸³

Nevertheless, Supply Pro argues that RingCentral's Terms of Service are boilerplate, and that the provisions relating to the TCPA are "bur[ied]" in them and are therefore ineffective.⁸⁴ They further assert that the Terms of Service are irrelevant as they address customer-created content that is not authored by RingCentral, and that by making the cover sheet available,

use of declaratory rulings to terminating controversies between parties. Section 554 also empowers agencies to use declaratory rulings to 'remove uncertainty, . . .').

⁸³—See RingCentral Terms of Service (rev. Feb. 2016), available at: <http://www.ringcentral.com/legal/eulatos.html> ("RingCentral Terms of Service"), at 6.B, 6.C., 6.F. (last visited Sept. 13, 2016); RingCentral Petition, at 4-7.

⁸⁴ Supply Pro, at 3.

RingCentral somehow implied that the cover sheets complied with the law regardless of what the Terms of Service provide.⁸⁵ Of course, both of these arguments are misguided.

First, “buried in the contract” is not a recognized legal doctrine that justifies ignoring a provision that you do not like. All customers that accept RingCentral’s service do so pursuant to the terms that RingCentral establishes for that service. This specifically includes all of the content that they send via fax. Even if the *de minimis* information in the cover page footer is considered to be a separate communication, which it is not, the terms make clear nonetheless that the information sent is the customer’s communication and not RingCentral’s. Claims that customers are not expected to comply with the terms and conditions that they agree to abide by in order to lawfully access and use the service, simply because reading the Terms of Service is inconvenient, is a hollow argument.

In arguing that the Terms of Service are irrelevant to the *de minimis* information in the footer because the footer was “created” by RingCentral,⁸⁶ Supply Pro ignores the fact that RingCentral’s customer: (1) decided to send a fax to the recipient, (2) chose to include a cover sheet with the fax, (3) elected to use the cover sheet template, (4) filled out the cover sheet, (5) entered the recipient’s fax number, (6) decided when to send the message, and (7) determined the content of the communication. RingCentral did not provide input into any of these decisions. Clearly, RingCentral is not the “sole actor responsible” for the sending of the alleged unsolicited advertisement as claimed by Supply Pro.

Supply Pro also contends that by offering cover sheets with footers, RingCentral was “implying they were legal” and that it would be “nonsensical to think that RingCentral provided

⁸⁵ Supply Pro, at 13-14.

⁸⁶ Supply Pro, at 12.

illegal fax covers relying on its customers never to use them.”⁸⁷ This, of course, just begs the question of whether the cover sheets are “illegal” to begin with (which they are not). Supply Pro does not argue that RingCentral’s customers violated the TCPA by using the template cover sheets. At best, Supply Pro argues that RingCentral “implied” that use of the cover sheets did not result in RingCentral’s violation of the TCPA. The use of these cover sheets does not violate the TCPA at all. Supply Pro’s argument also ignores the fact that RingCentral’s Terms of Service unmistakably require its customers to comply with the TCPA, and makes them responsible for the content of the messages they send.⁸⁸

Further, in the portion of its comments concerning third party consent, Supply Pro inexplicably points to the RingCentral Terms of Service where customers represent they have the requisite consent, noting that while RingCentral’s customers were contractually required to obtain permission, they may not have done so, and RingCentral has no way to know whether they did or not (and thus, cannot rely on such third party consent).⁸⁹ The practical nature of third-party consent for communications service providers is that the provider relying on it does not know if the party representing that it has such consent does, in fact, have consent from the recipient. It would be impossible to provide communications services at commercial scale if providers were required to verify all third-party consents that their customers must obtain. Moreover, this is not an argument to prohibit a party from relying on third party consent; rather, it simply highlights the peril of the party that does so.

Mr. Roylance maintains that RingCentral cannot rely on its Terms of Service for the proposition that the “sender,” for purposes of the TCPA, is the customer and not RingCentral as

⁸⁷ Supply Pro, at 13-14.

⁸⁸ See RingCentral Terms of Service, at 6.B, 6.C., 6.F.; RingCentral Petition, at 4-7.

⁸⁹ See Supply Pro, at 21-22.

“RingCentral has violated its own Terms of Service by including unsolicited advertisements on its cover sheets.”⁹⁰ Again, Mr. Roylance misses the point. The RingCentral Terms of Service establish the contractual arrangement between RingCentral and the customer, and make it explicitly clear that the customer is responsible for all content sent using the service, as well as compliance with TCPA.⁹¹ Because fax transmitters already have an established association with the fax recipient and are required by RingCentral’s terms not to use the service to send unsolicited advertisements, commercial messages, solicitations, marketing or promotional materials, the TCPA’s goals of preventing unsolicited fax advertisements and avoiding costs associated with those messages, as well as of protecting consumer privacy, are not negatively impacted.⁹² Arguments that the Terms of Service are ineffective or irrelevant are baseless, and are designed to distract the Commission from the substance of the Petition.

V. THE COMMISSION SHOULD CLARIFY THAT THE *DE MINIMIS* EXCEPTION CAN APPLY WHERE NEITHER AN INFORMATIONAL NOR TRANSACTIONAL MESSAGE IS SENT

In the Petition, RingCentral asked the Commission to clarify the scope of its rulings regarding *de minimis* advertising and create a bright line exemption, not limited to whether the fax at issue was informational or transactional.⁹³ Supply Pro and Anderson + Wanca respond rather formulaically to this proposal. They both point out that, to date, the Commission has only applied the *de minimis* exception to informational or transactional messages.⁹⁴ RingCentral does

⁹⁰ Roylance, at 3.

⁹¹ See, e.g., *RingCentral Terms of Service*, at 6.C. (“You are the creator of the content of, and are solely responsible for determining the destination(s) and recipient(s) of, all outbound communications made using Your Plan Services . . .”).

⁹² See *RingCentral Terms of Service*, at 6.B., 6.C, 6.F.; *RingCentral Petition*, at 4-7.

⁹³ See *Petition* pp. 27-28; 34.

⁹⁴ See *Supply Pro*, at 18; *Anderson + Wanca*, at 6.

not claim that the underlying fax in its dispute with Supply Pro was either informational or transactional. In fact, RingCentral has no information about the content of that fax, since it didn't create the fax or select the recipient of that fax. Instead, RingCentral asks the Commission to clarify that in certain circumstances, such as those in RingCentral's case, when a fax broadcaster includes *de minimis* advertising on a fax transmittal that is then conveyed by a third party, that such transmissions should not result in TCPA liability,

Both Anderson + Wanca and Supply Pro acknowledge that the purpose of the fax section of the TCPA is to prevent fax advertisers from shifting the costs of their advertising to fax recipients. The *de minimis* exemption recognizes that *de minimis* advertising imposes no such burden. The same applies to the fax received by Supply Pro and sent by a RingCentral customer.

As the Petition explains, the footer in the fax about which Supply Pro complains represents a small fraction of the overall fax.⁹⁵ Because the RingCentral tagline in the footer of the cover page represents such an insignificant portion of the fax, its presence did nothing to increase the burden on Supply Pro. Even without the tagline, the fax still would have been sent, it still would have been four pages long, and there would have been no noticeable difference in the burden on Supply Pro in terms of toner, paper, electricity, physical wear-and-tear, telecommunications usage and other costs incurred, or time spent reading the fax.⁹⁶

Neither Anderson + Wanca nor Supply Pro effectively respond to this argument. Instead, they both argue that the published court cases cited in the Petition only apply to the informational and transactional *de minimis* exceptions.⁹⁷ RingCentral does not dispute this because it cited these cases, not as precedent to be applied, but rather to highlight cases where courts found

⁹⁵ See Petition at 28.

⁹⁶ See Petition at 28.

⁹⁷ See Supply Pro, at 18-20.

advertising to be *de minimis* and compare the burden on the fax recipient in those cases to the burden claimed by Supply Pro in its current controversy involving RingCentral.

Indeed, Supply Pro claims that nothing in the informational and transactional exceptions supports the result that RingCentral seeks.⁹⁸ Yet at the same time Supply Pro admits that the purpose of the TCPA is to prevent the shifting of costs from the advertiser to the recipient.⁹⁹ The *de minimis* exceptions however stand for the proposition that a *de minimis* amount of advertising does not violate the protections afforded by the TCPA and thus will not create liability. RingCentral merely asks the Commission to clarify that in this case, where RingCentral, acting as a fax broadcaster, with no knowledge of the content of any fax (except perhaps its tagline on the cover pages that customers may or may not decide to use) and without any influence over who receives the fax, be exempted from liability when any advertising message on its cover page is *de minimis*. Further, providing such clarification to resolve the controversy here is well within the Commission's power to issue a declaratory ruling and it should do so.¹⁰⁰

VI. PERMITTING THIRD PARTY CONSENT IN THE CONTEXT OF FAX MESSAGES IS CONSISTENT WITH EXISTING COMMISSION POLICY

In alternative grounds for relief in the Petition, RingCentral requested clarification that fax broadcasters can rely on consent obtained by their customers to send *de minimis* information along with a facsimile that is otherwise lawfully authored and sent by a the fax broadcaster's customer to a third party recipient, *i.e.*, third party consent. A number of parties opposing the Petition argue that while the FCC has previously found that third party consent is acceptable

⁹⁸ See *Id.* at 21.

⁹⁹ See Supply Pro, at 20-21.

¹⁰⁰ See *e.g.*, *Conference Group*, 720 F.3d at 965 (noting that the FCC has broad discretion in deciding whether to proceed by declaratory ruling).

under the TCPA, that ruling was made under a different section of the TCPA applicable to phone calls and text messages and thus the FCC should not grant RingCentral's requested relief. RingCentral respectfully asserts that third party consent should be recognized in the context of fax messaging just as it is in the case of calls and texts, and that doing so will ensure that the Commission is consistent in its policies for all types of messaging covered by the TCPA.

Mr. Biggerstaff, for example, recommends that the FCC not allow parties to rely on third-party consent when sending faxes. He argues that calls to cell phones are different than faxes in that the standards for sending each differs.¹⁰¹ Likewise, Anderson + Wanca argues that since voice calls and faxes are treated differently under the TCPA, the FCC should reject RingCentral's argument that third party consent is sufficient under limited circumstances.¹⁰² Anderson + Wanca contends that under the TCPA a fax advertising sender must have "prior express invitation or permission" and must demonstrate that the recipient agreed to receive fax advertisements from a particular company or organization. Based on this, Anderson + Wanca argues that express consent cannot be transferred, citing to *Satterfield v. Simon & Schuster*.¹⁰³ However, *Satterfield* involved TCPA provisions related to text messages and calls, not faxes, and therefore, itself implicates a different section of the TCPA.¹⁰⁴ Accordingly, Anderson + Wanca proposition that third party consent cannot be used in the context of fax messages because the TCPA sets different standards for faxes and calls fails on its face as the legal authority it

¹⁰¹ Mr. Robert Biggerstaff Comments, CG 02-278, at 3-4.

¹⁰² Anderson + Wanca, at 7-8.

¹⁰³ Anderson + Wanca, at 8, 8 n.29 citing 569 F.3d 946, 955 (9th Cir. 2009).

¹⁰⁴ *Satterfield*, 569 F.3d at 949-950.

mistakenly relies on implicates the portion of the TCPA applicable to calls and text messages not faxes.¹⁰⁵

Of course, the FCC has already clarified in the context of text messages and calls that third party consent is allowable under certain circumstances, which is exactly the alternative relief RingCentral seeks.¹⁰⁶ The concept of third party consent is no different when applied to faxes, calls or text messages. Moreover, prior to the FCC's clarification that such consent was acceptable for text messages and calls, there was an open question as to whether third party consent satisfied the FCC's rules in that context. The clarification sought by RingCentral is no different than the situation presented by GroupMe in this regard. RingCentral simply asserts that the same third party consent policy that applies to calls and texts should apply to faxes. There is nothing special about faxes or the language of the TCPA that should lead the Commission to an opposite result. In fact, it is difficult to imagine a reason why the Commission would decide to reverse its prior policies on third party consent under the TCPA in order to treat faxes differently from calls and texts.

Mr. Biggerstaff asserts that consent for sending faxes has multiple elements that must be satisfied as opposed to just one for calling cell phones, and that the standard for faxes is "prior express invitation or permission," which differs from "express consent."¹⁰⁷ Of course, even if one accepts Mr. Biggerstaff's claim of differing standards, it is unclear why relying on a third party for consent is inappropriate for faxes but acceptable for calls and text messages under each of these standards. Likewise, as set forth in the Petition, the standard for determining "consent"

¹⁰⁵ *Id.* at 951-54.

¹⁰⁶ See *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd. 3442 (2014).

¹⁰⁷ Biggerstaff, at 3-4.

in the case of faxes is analogous to that in the telemarketing calls context, if not more flexible.¹⁰⁸ In the telemarketing calls context, “prior express written consent” is required under the Commission’s rules for telemarketing communications while “prior express consent” is required for non-telemarketing messages. But, in the case of fax communications, an “unsolicited advertisement” fax is permitted: both in the context of an “established business relationship” coupled with “voluntary communication of the recipient’s number by the recipient directly to the sender, within the context of such established business relationship;” and/or “prior express invitation or permission,” which renders the communication to not be “unsolicited.” If anything, fax senders have a lower burden to meet, not a higher one.

Supply Pro argues that RingCentral would not know whether its customers have permission to fax advertise in the first place.¹⁰⁹ However, it is entirely unclear why this fact is important, or is a matter of legal interpretation or clarification for the FCC to consider. The very basis of RingCentral’s request is to clarify that RingCentral can rely on implied consent of its customer as a legal matter. Since the consent would be implied, it follows that RingCentral would not necessarily know if the customer had actual consent. Again, RingCentral maintains that the same policy that the Commission applied in the *GroupMe Declaratory Ruling* for calls and texts should apply in this case for faxes.

Supply Pro also argues that the text in the footer is advertising such that even if the FCC granted that RingCentral could rely on third party consent, RingCentral would still be liable as the company did not include the requisite opt-out notice.¹¹⁰ Of course, for the reasons set forth in the Petition, RingCentral does not believe that the information in the footer is advertising, or

¹⁰⁸ See RingCentral Petition, at 29-33.

¹⁰⁹ See Supply Pro, at 21-22.

¹¹⁰ See Supply Pro, at 23.

should be treated as advertising, and as such, an opt-out message should not be required in order for RingCentral to rely on third party consent. A policy of recognized third party consent would simply allow RingCentral to include *de minimis* information along with a facsimile that is otherwise lawfully authored and sent by a the fax broadcaster's customer to a third party recipient, as requested in the Petition.

Given the ambiguity in the *2006 TCPA Order*, RingCentral respectfully requests that the Commission make explicit that, in any circumstance in which a fax broadcaster is treated as the "sender" of a facsimile message that contains *de minimis* information, that a provider may rely on the consent held or obtained by the fax broadcaster's customer, including any "prior express invitation or permission" or "prior business relationship" exception that may apply. Without a clear interpretation on this issue, class action plaintiffs will argue that any *de minimis* and inconsequential language on a fax cover sheet is enough to constitute an "unsolicited advertisement," which would chill the use of internet fax services and communications between parties that otherwise want to receive such communications. Instead, the Commission should apply the policies it clarified in the *GroupMe Declaratory Ruling* regarding third party consent to fax messages, which the Commission has already determined is consistent with the TCPA.

VII. CONCLUSION

Opposing parties' have presented no compelling arguments for the Commission to deny the RingCentral Petition. Indeed, opposing parties' comments illustrate why the Commission must clarify the meaning of the term "sender" and its' *Letter Brief* based on the distorted interpretations proffered by opponents. Clarification is also required in order to stem the tide of an ever-increasing number of courts that are misinterpreting the *Letter Brief*. Given the availability of statutory damages calculated on a per fax basis, clarification is critically important so as not to subject companies to potentially millions of dollars in damages for innocuous

conduct. There is simply no policy justification identified by opposing parties, or that one can imagine, served by exposing companies to TCPA liability based solely on companies' goods or services appearing in unsolicited fax advertisements.

Likewise, clarity is needed regarding how substantial a communication must be in order to constitute an injury entitled to relief under the TCPA. Particularly with respect to the facts underlying plaintiff's putative class action complaint against RingCentral, the Commission should declare that when a fax sent by a customer of fax broadcaster includes a *de minimis* amount of text concerning the fax broadcaster, such text does not constitute an advertisement unless it exceeds a certain threshold. Specifically, whether a fax qualifies as a *de minimis* advertising message depends on whether the *de minimis* message exceeds a threshold percentage of 5% of the overall length of a cover page attendant to a fax. The Commission should declare that cover sheets are not unsolicited advertising when present on informational, transactional or even another party's unsolicited advertising fax. Importantly, providing this relief will protect not only the company but also its customers from frivolous lawsuits that serve no purpose other than to enrich plaintiffs' attorneys.

Alternatively, the Commission should find that under certain circumstances, fax broadcasters can rely on third party consent in order to send a fax. Specifically, under circumstances where the fax broadcaster and customer have no marketing relationship whatsoever such that the customer makes all salient decisions about a fax communication, including the content of a fax, whether, when and to whom to send a fax and when the only information pertaining to the fax broadcaster is *de minimis* (such, as here, exclusively appearing in the footer of the cover page), parties that qualify as "senders" under the Commission's rules can rely on intermediaries obtaining the requisite consent from the recipient of the faxed

communication. But RingCentral submits that it would be far more important for the Commission to clarify the proper interpretation of the term “sender” and its *Letter Brief* as well as to define a *de minimis* threshold below which text cannot satisfy the definition of an “advertisement” under its TCPA rules.

Respectfully submitted,

RingCentral, Inc.

By: /electronically signed/

Bruce Johnson
Vice President, Legal
RingCentral, Inc.
1400 Fashion Island Blvd
San Mateo, CA 94404

Ronald W. Del Sesto, Jr.
Joshua M. Bobeck
Morgan Lewis & Bockius LLP
2020 K ST NW
Washington, DC 20006

Dated: September 13, 2016